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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1408
A07-2115**

Houston County,
Respondent,

vs.

Matthew Solum,
Appellant (A07-1408),

and

Matthew Solum, et al.,
Relators (A07-2115),

vs.

Houston County Board of Commissioners,
Respondent.

**Filed September 16, 2008
Affirmed
Collins, Judge***

Houston County District Court
File No. 28-CV-06-1373

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

In these consolidated appeals, appellant-relator Matthew Solum¹ challenges (1) the district court's determination that his property does not conform with Houston County's zoning ordinance and (2) the county's subsequent denial of his application for a conditional-use permit. We affirm.

FACTS

In October 2005, Solum purchased a house and approximately eight acres of land (the property) in Houston County (the county). The property is located within an area designated as an Agricultural Protection District under the county's zoning ordinance. *See* Houston County, Minn., Zoning Ordinance §§ 0110.1301-.1311 (2004). Shortly after Solum acquired the property, the county informed him that his use of the property did not comply with the zoning requirements applicable within the county's Agricultural Protection District and requested that he remedy the noncompliance. Unsatisfied with Solum's response, the county commenced a zoning-enforcement action against Solum in district court. On the county's motion for summary judgment, the district court

¹ Matthew Solum's wife, Beth Solum, is also a party in appeal A07-2115. For ease of reference, both parties are referred to as "Solum."

concluded that Solum was not in compliance with the zoning ordinance and ordered judgment for the county. Solum then applied to the Houston County Board of Commissioners (the county board) for a conditional-use permit (CUP) allowing him to maintain the property in its then-current condition. After filing his CUP application, Solum also moved the district court to vacate the judgment against him in the zoning-enforcement action, arguing that the district court lacked subject-matter jurisdiction. The district court denied Solum's motion to vacate, and the county board subsequently denied Solum's CUP application. These consolidated appeals followed.

D E C I S I O N

I. The district court properly exercised jurisdiction over the county's zoning-enforcement action.

Solum challenges the district court's denial of his motion to vacate the judgment against him in the zoning-enforcement action, arguing that the existence of an administrative remedy deprived the district court of subject-matter jurisdiction. Challenges to a court's subject-matter jurisdiction may be raised at any stage of the proceedings. *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). The existence of subject matter jurisdiction is a question of law, which we review de novo. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002).

Under the exhaustion-of-administrative-remedies doctrine, "a party aggrieved by a decision of a municipality's governing body must exhaust all administrative remedies before seeking judicial review." *Med. Servs., Inc. v. City of Savage*, 487 N.W.2d 263,

266 (Minn. App. 1992). This requirement ordinarily precludes a landowner from challenging the decision of a zoning authority in court without first exhausting any available administrative appeals. See *Zaluckyj v. Rice Creek Watershed Dist.*, 639 N.W.2d 70, 74-77 (Minn. App. 2002) (addressing exhaustion of administrative remedies in the context of drainage and ditch repair processes), *review denied* (Minn. Apr. 16, 2002); see also Minn. Stat. § 462.361, subd. 2 (2006) (providing that “a municipality may raise as a defense the fact that the complaining party has not attempted to remedy the grievance by use of [administrative] procedures”).

This case, however, does not involve an aggrieved landowner seeking to circumvent the administrative process through judicial intervention. Instead, the county is seeking to enforce its zoning ordinance against a noncompliant landowner. Counties are specifically authorized by law to initiate a cause of action “to prevent, restrain, correct, or abate” a zoning violation. Minn. Stat. § 394.37, subd. 3 (2006). Solum has provided no authority supporting his argument that the availability of a CUP procedure, which could possibly cure a nonconforming use, deprives the county of its authority to enforce a zoning ordinance under section 394.37. Accordingly, we conclude that the doctrine of exhaustion of administrative remedies is inapplicable to this case.

II. The district court correctly concluded that Solum’s property does not comply with the county’s zoning ordinance.

Solum challenges the district court’s conclusion that the property does not comply with the county’s zoning ordinance. The interpretation of a zoning ordinance is a

question of law, which we review de novo. *Tuckner v. Twp. of May*, 419 N.W.2d 836, 837 (Minn. App. 1988).

Solum purchased property located in the county's Agricultural Protection District. Counties are explicitly authorized to create such districts under Minn. Stat. § 394.25, subd. 2 (2006). The purpose of the Agricultural Protection District is to “[r]etain, conserve, and enhance agricultural land,” to “[p]rotect and preserve natural resources and environmentally sensitive areas,” and to “[r]estrict scattered non-farm residential development. . . .” Houston County, Minn., Zoning Ordinance § 0110.1301, subd. 1(1)-(3). Accordingly, the Agricultural Protection District “is a zoning district in which land is used principally and foremost for agricultural production.” *Id.*, subd. 2. Within the Agricultural Protection District, single-family dwellings that are not devoted to agricultural use are permitted only if “located on 40 or more contiguous acres.” *Id.*, .1302, subd. 1(5). Because the property at issue here consists of approximately eight acres and contains a single-family dwelling that is not devoted to agricultural use, the district court concluded that Solum's use of the property violates the 40-contiguous-acre requirement found in section 0110.1302, subdivision 1(5) of the county's zoning ordinance.

The crux of Solum's argument is that his use of the property should be allowed because the prior owner's use was permitted and there is no provision in the ordinance addressing sales of property in which the “use” remains the same. But the prior owner's use was permitted because the prior owner owned more than 40 contiguous acres, as required by the zoning ordinance. Solum purchased the dwelling and approximately

eight acres of land. The zoning ordinance plainly states that the use of a single-family dwelling for non-agricultural purposes is permitted only if the dwelling is “located on 40 or more contiguous acres.” *Id.* Because Solum’s dwelling is located on less than 40 contiguous owned acres, the district court correctly determined that Solum’s use of the property violates the county’s zoning ordinance.

III. The county did not violate Solum’s right to procedural due process.

Solum challenges the county’s denial of his application for a CUP, arguing that the county violated his right to procedural due process. *See* U.S. Const. amend. XIV, § 1 (providing that no person shall be deprived of property “without due process of law”); Minn. Const. art. I, § 7 (same). Whether a procedure violates due process is a question of law, which we review *de novo*. *In re Expulsion of N.Y.B.*, 750 N.W.2d 318, 327 (Minn. App. 2008).

The procedure for obtaining a CUP is established by statute and ordinance. Counties may designate certain uses as conditional uses, which are “approved upon a showing by [the] applicant that standards and criteria stated in the ordinance will be satisfied.” Minn. Stat. § 394.301, subd. 1 (2006). A CUP is issued “only upon the order of the [county] board or the [county] planning commission as designated by ordinance.” *Id.*, subd. 2 (2006). A public hearing must be held before any CUP “is approved or denied by the responsible authority.” Minn. Stat. § 394.26, subd. 1a (2006). “The [county] board “may assign responsibility to conduct public hearings . . . to the planning commission, board of adjustment or any official or employee of the county.” *Id.*, subd. 3a (2006). In Houston County, the responsibility to conduct public hearings on

CUP applications is assigned to the Houston County Planning Commission. Houston County, Minn., Zoning Ordinance § 0110.0602, subd. 4 (2004). Following the hearing, the planning commission “shall report to the County Board of Commissioners findings and recommendations.” *Id.*, .0603. “Upon receipt of the report . . . the County Board of Commissioners shall hold whatever public hearings it deems advisable and shall make a decision.” *Id.*

When a governing body considers an application for a CUP, it acts in a quasi-judicial capacity. *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978). “These quasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings.” *Id.* An applicant’s due-process rights entitle him to “reasonable notice of [the] hearing and a reasonable opportunity to be heard.” *Id.* Solum argues that the county board violated this standard by refusing to accept certain rebuttal evidence, which Solum submitted after his hearing before the planning commission.² Solum’s contention is that he was not given notice “that the Planning Committee is the only available hearing for a [CUP] applicant to present evidence.” But the zoning ordinance plainly states that the public hearing on a CUP application is conducted by the planning commission and that the county board, after receiving the planning commission’s findings and recommendations, “shall hold whatever public hearings it deems advisable and shall make a decision.” Houston

² There is no contention that Solum was denied notice and an opportunity to be heard at the hearing before the planning commission. Indeed, his attorney argued in support of Solum’s application and submitted written materials, which were received into the record.

County, Minn., Zoning Ordinance § 0110.0602, subd. 4, .0603. There is no requirement that the county board hold any hearing or accept any evidence beyond what was submitted to the planning commission. Thus, Solum had notice that the hearing before the planning commission may well be his only opportunity to submit evidence.

Solum also argues that his “ability to obtain a fair hearing before an impartial decision-maker” was “undermin[ed]” because the decision of the county board included a reference to the district court’s determination that Solum’s use of the property did not conform to the requirements of the zoning ordinance. We disagree. Solum’s nonconforming use is the reason why he applied for a CUP, which he recognizes “would have cured” the violation. Because the purpose of Solum’s after-the-fact CUP application was to cure his nonconforming use, we do not see how a reference to the fact that his use of the property had been found to violate the zoning ordinance could be prejudicial to Solum’s application. In any event, Solum has pointed to no facts demonstrating how or why he was prejudiced by reference to the judgment. *See Barton Contracting*, 268 N.W.2d at 716 (rejecting a claimed due-process violation when the applicant “has not particularized in any way how or why its interests were prejudiced”).

IV. The denial of Solum’s CUP application was not arbitrary, capricious, or unreasonable.

Finally, Solum challenges the substantive decision of the county board to deny his CUP application. In such cases, our review “is limited to determining whether the decision was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Picha v. County of McLeod*, 634 N.W.2d

739, 741 (Minn. App. 2001) (quotation omitted). “Local authority over land use is entitled to great deference, and we will not upset a county’s decision unless it has no rational basis.” *Molnar v. County of Carver Bd. of Comm’rs*, 568 N.W.2d 177, 181 (Minn. App. 1997). The reasonableness of the decision is measured against the standard for a CUP set out in the local ordinance. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981). If there is at least one valid basis for the decision, it will be upheld on appeal. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997) .

A. The county board’s finding that the dwelling is located on class III soil is supported by the evidence.

The county’s zoning ordinance provides that a single-family, non-farm dwelling is not eligible for a CUP within the Agricultural Protection District if the dwelling is located “on land which is of soil classifications of Class I-III soils rated in the Soil Survey – Houston County by the U. S. D. A. Natural Resource Conservation Service.” Houston County, Minn., Zoning Ordinance § 0110.1303, subd. 1(11). The U.S.D.A.’s *Soil Survey of Houston County, Minnesota* is essentially a map of the county indicating the locations of various soil types within the county and providing descriptions of those soils. Solum concedes that this map indicates that his dwelling is located on class III soil, but argues that the dwelling is not actually located on class III soil but is instead located on a mixture of soils that are “unrateable.” This argument is based on reports prepared by his expert witness. The record also contains contrasting evidence from other experts, who asserted that the dwelling was, in fact, located on class III soil. The county board

weighed the competing evidence and concluded that “the evidence in this case supports the conclusion that the Soil Survey map is not erroneous.”

A zoning authority is frequently presented with conflicting evidence and must weigh that evidence when making its decision. *See, e.g., Billy Graham Evangelistic Ass’n v. City of Minneapolis*, 667 N.W.2d 117, 124-25 (Minn. 2003) (concluding that “the City acted appropriately in accepting and considering all expert testimony before reaching its decision”). On appellate review, our function is not to reweigh the evidence, “but to review the record to determine whether there was legal evidence to support the zoning authority’s decision.” *Barton Contracting*, 268 N.W.2d at 718; *accord Billy Graham Evangelistic*, 667 N.W.2d at 124 (stating that “courts should not attempt to weigh the credibility of conflicting experts” but instead “ensure that the decision . . . had support in the record”). Here, the record contains ample evidence supporting the county board’s decision. Two experts, Robert Scanlan and Ralph Tuck, visited the site in 2004, prior to and during the construction of the dwelling. They both indicated that the site contained class III soil based on their physical observations. Additionally, six out of seven soil borings taken in the vicinity of the site confirmed class III soil. The seventh boring was from an area that was disturbed by construction of the dwelling and contained a mixture of soils. The experts disagreed over the interpretation of this boring, but even Solum’s expert conceded that it displayed characteristics similar to “Frankville” soil, which is a class III soil.

If there is evidence in the record supporting the decision, “this court may not substitute its judgment [for that of the zoning authority] . . . even if it would have reached

a different conclusion.” *BECA of Alexandria, L.L.P. v. County of Douglas*, 607 N.W.2d 459, 463 (Minn. App. 2000). Because the record contains evidence supporting the county board’s finding that the dwelling is located on class III soil, we uphold the county board’s decision.

B. The county board’s decision was not arbitrary, capricious, or unreasonable.

Solum asserts that the county board has previously granted CUPs to other property owners for dwellings located on class III soils—an assertion that the county disputes. Based on this assertion, Solum argues that the disparate treatment he received indicates that the county board arbitrarily denied his CUP application. *See Billy Graham Evangelistic*, 667 N.W.2d at 126 (“Disparate treatment of two similarly-situated property owners may be an indication that the local government is acting unreasonably or arbitrarily.”).³

Even if we assume, for purposes of argument, that Solum’s assertion regarding the prior CUP applications is correct, it would be an insufficient basis to overturn the county board’s decision in this case for two reasons. First, Solum and the prior applicants are not similarly situated. Solum’s application was filed in June 2007. The most recent prior application cited by Solum was considered by the county board nearly a year and a half earlier, in February 2006. CUP applications that are filed in different years are “not similarly situated.” *Kottschade v. City of Rochester*, 537 N.W.2d 301, 306 (Minn. App.

³ At oral argument, Solum’s attorney clarified that he was not raising an equal-protection challenge.

1995), *review denied* (Minn. Nov. 15, 1995). Second, even if the county board improvidently issued CUPs for dwellings located on class III soils in the past, that fact would not entitle Solum to a CUP because a zoning authority cannot be required to issue a CUP based on a prior erroneous application of the zoning ordinance. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 607 (Minn. 1980); *Prior Lake Aggregates, Inc. v. City of Savage*, 349 N.W.2d 575, 580 (Minn. App. 1984).

Lastly, Solum argues that the county board's decision not to consider his application under the "other uses" category of the CUP ordinance was "arbitrary, capricious and unreasonable." The conditional uses for which a CUP may be granted are listed in subdivision 1 of section 0110.1303 of the county's zoning ordinance. The terms of a zoning ordinance are interpreted "according to [their] plain and ordinary meaning." *Frank's Nursery Sales*, 295 N.W.2d at 608.

The county's zoning ordinance enumerates 27 specific uses for which a CUP may be granted by the county board. *See* Houston County, Minn., Zoning Ordinance § 0110.1303, subd. 1(1)-(27). Included in this list of specifically enumerated conditional uses is use as a single-family, non-farm dwelling. *Id.*, subd. 1(11). Subdivision 1(30) provides that "[o]ther uses . . . that are similar to those listed above" may also be conditional uses. *Id.*, subd. 1(30). "[O]ther" means "[d]ifferent from that or those implied or specified." *The American Heritage Dictionary of the English Language* 1282 (3d ed. 1992). A "single-family, non-farm dwelling" being one of the specified uses in subdivision 1, a single-family, non-farm dwelling cannot also be an "other use" because it is not a use "different from" the specified uses. Accordingly, the county board's

decision not to consider Solum's application under the "other uses" category was not arbitrary, capricious, or unreasonable.

Affirmed.